

# Case and Comment

## NOTES OF

### RECENT IMPORTANT, INTERESTING DECISIONS

### INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED LEGAL NEWS NOTES AND FACETIAE

VOL. 11.

DECEMBER, 1904.

No. 7.

#### CASE AND COMMENT

Monthly. Subscription, 50 cents per annum post-paid. Single numbers, 5 cents.

THE LAWYERS' CO-OPERATIVE PUB. CO.,  
Rochester, N. Y.

NEW YORK, CHICAGO,  
81 Nassau St. 205 Dearborn St.

Entered at post office at Rochester, N. Y. as  
second-class mail matter.

#### As Seen by Foreigners.

Goldwin Smith, in a recent address at Toronto, took a dark view of the future of the United States. He said: "The free North, if it is rid of slavery, is not rid of the race question, or of lynching. The horizon altogether in that quarter is dark. At present jingoism reigns with its 'strenuous life,' its 'big stick,' its swaggering, boastful aggressiveness, its contempt of right. Suppose expansion takes a southern course, and extends to the line of the Panama canal, taking in a vast alien population, there may be another disruption; there can hardly fail to be a change of institutions. If you have an empire, you must have an emperor."

Remembering that the value of the utterances of this venerable scholar is summed up in one of the encyclopedias by saying that he is always interesting, but "dogmatizes sometimes," it may be hardly worth while to pay very much attention to the dark picture of our future, which seems, from this and other similar words of his in recent

years, to have become ever present in his mind. It is a taking phrase to say: "If you have an empire, you must have an emperor." The meaning intended certainly is that this would be the end of republican institutions. It is quite certain, however, that this eminent Englishman would strenuously contend that English liberty is quite as great as that in this country, notwithstanding the unparalleled extension of the British Empire. The mask or shell of monarchy in England exists in connection with what are essentially free and republican institutions. Albert Edward is called Emperor of India, but British liberties do not seem to suffer severely by reason of that title; nor would they be greatly affected, either for better or for worse, if the ancient and ornamental shell of monarchy were taken off altogether. In other words, the British Empire without its Emperor would be, in substance, the same.

Goldwin Smith's belief that the dominant spirit of this country is at present that of jingoism and a swaggering, boastful aggressiveness, and a contempt of right, has doubtless been adopted from a few professional scholars in this country, who seem to have little respect for either the moral or the intellectual status of the people at large. But "the character of the state," said Wendell Phillips, "is shown by the character of those it crowns." By this test, when we look over the long line of our Presidents, and compare them, either for intellectual ability or moral character, with any other line of rulers in history, we need not be ashamed of the people whom they represent.

The horizon in this quarter, that looks altogether dark to Goldwin Smith, has always looked dark to many who could see nothing in our future but the "man on horseback," who was to subvert our liberties. But in these days it is only here and there, even among foreigners, that this nightmare appears. With democracy increasingly triumphant for more than a century, and its spirit steadily permeating every civilized nation, only a heated imagination is terrified over its future.

John Morley, a broad scholar, who has also been taught by much practical experience in the affairs of statesmanship, took occasion, during his recent visit to the United States, to declare his firm faith in democracy, and to express his admiration of the excellent temper of the American people—the defeated as well as the victorious—in the result of the presidential election. He added: "What struck me with delight was that the two candidates were each of them men of unstained character, were men of perfect probity and independence, were men either of whom, so far as character goes, whatever you may say about policy, any country might have been proud to see as an aspirant for its support." The civilized world has learned that these are typical of the class of men whom the American people have from the beginning chosen to their highest office, and its view of the future of this nation is now represented, not by the fears of Goldwin Smith, but by the faith of John Morley.

---

◆◆◆

**May the Public Take Incorporeal  
Property without Making Compen-  
sation?**

---

A recent decision of the circuit court of appeals for the sixth circuit is so at variance with what would seem to be fundamental principles that, were it the first, instead of the last, of a series of cases which have been tending in that direction, its doctrine would not be regarded otherwise than startling.

We refer to *Salliotte v. King Bridge Co.* 65 L. R. A. 620, 58 C. C. A. 466, 122 Fed. 378. There were some elements in the case which perhaps may have made the final decision correct, but the general facts leading to

the ruling which is the subject of this comment were, that a bridge had been built across a navigable river in such a way as to interfere with the navigable channel, and a new channel had then been dredged to accommodate traffic. The result of the improvement was that the current of the stream was turned directly against the bank, and, as the riparian owner who brought the action to recover for his injuries alleged, this caused the tearing and carrying away of a large part of the frontage of his land on the river, doing great damage to his property. The court, after eliminating the other elements of the case, said that there could be no recovery unless the injury constituted an appropriation of the *land*, or a taking thereof, within the meaning of the constitutional requirement as to compensation. The court, proceeding to discuss that phase of the case, says that, as a riparian proprietor plaintiff was subject to all the injury, not amounting to a taking of his *land*, which might result from the lawful improvement of the navigation of the stream. It then asks: Has there been any appropriation of plaintiff's *land* by anyone?—and answers this question by saying that the injury has not been by flooding, or any sort of possession, but simply by the natural effect of the flow of the current upon the bank against which it has always flowed. The incidental injury was one which might have been guarded against by a protecting line of piles, or by a sea wall, and the question at last is, whose duty it was properly to protect a river bank exposed to waste by the increased volume and force of the current to which it is exposed. The court concludes: "That such a consequential injury is a taking or appropriation, we cannot agree." It will be noticed that the court says that "there can be no recovery, unless there is a taking of the *land*." But the Michigan Constitution provides that "the property of no person shall be taken for public use without just compensation therefor." Art. 18, § 14. Presumably, if the court's attention were called to the fact it would agree that the word "property" is much broader than the word "land." In fact, *Bouvier* says (*Dict. verbo Property*) that, in a strict legal sense, land is not property, but the subject of property. That property is the right to possess, use, and enjoy a thing. And a reference to *Blackstone* (2 Com. chap. 3) shows

that the physical or corporeal thing may be the least valuable property right. The property owned by one who has a legal title to a parcel of land bordering on a navigable stream consists, not only in the paper title to, and right to convey, the land itself, but also in all the advantages which are conferred by such location. The right to have the stream follow its ancient channel is a property right, as is also the right to have the stream remain free from such changes as will cast the water onto his land, unless such changes are caused by nature. His right of access to the stream is a property right, as is also his right to make reasonable use of the water as it flows past his premises. It is not necessary to take away the paper title to the land, or to deprive the owner of the possibility of selling or conveying it because of an adverse physical possession of it, to constitute a taking in the constitutional sense. A destruction, for the public benefit, of any of the incidental or incorporeal rights which are annexed to, or a part of, the land, and are themselves regarded as constituting property, is just as much a taking as is the appropriation of the land itself. This may be a consequential injury to the land, but it is more; it is the taking of a property right; and it is not until this distinction is seen and acted upon that the decisions of the courts will become satisfactory, and protect the individual in his property in the constitutional sense. It is absurd to say that, because it is for the interest of the public that an improvement be made, the private adjoining owner must be compelled to sacrifice, as in the Salliotte Case, a large portion of his farm by having it washed away, or incur a large expense which can add not one farthing to the former value of the land, for the purpose of protecting what he has from the direct consequences of the public act. If such result is not a taking of his property, it is only because the view of the court has become so obscured by the tangible thing which it can see—that is, the land—that it can no longer perceive the vast property rights which grow out of, and depend upon, the land, but which are as much property as is the land itself, and which may be destroyed just as truly without any physical invasion of the land as could the land by blotting it out of existence. Yet it is to be feared that this narrowing of the constitu-

tional term "property" has affected many courts, and that there has been a progressive tendency in recent years to hold that corporeal property only was protected by the Constitution. That this cannot be the true meaning of the term seems self-evident, for a constitutional provision can never be narrowed to embrace only a small part of the class embraced by the generic term. It would also seem that all that was necessary to correct this false position was to point out the error, and the reason for it. Even the Supreme Court of the United States has been affected by this narrowness of vision; and its decisions are probably the cause of the rule laid down in the Salliotte Case. As already stated, one of the property rights of the riparian owner is the right of access to the navigable part of the stream. *Buelch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418, 41 L. J. Exch. N. S. 137, 27 L. T. N. S. 1; *Lyon v. Fishmongers' Co.* L. R. 1 App. Cas. 662. Being a property right, it cannot be taken for public use without compensation. And the only way in which it could possibly be taken is by its destruction; so that the destruction is just as fully within the constitutional protection as would be the transfer of the title in case of corporeal property. Yet the Supreme Court of the United States, in *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, treats the deprivation of that property right as a consequential injury to the land, saying, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. But the government has no such dominant right. Atty. Gen. v. Wemyss, L. R. 13 App. Cas. 192, 57 L. J. P. C. N. S. 62, 58 L. T. N. S. 358. The rights of the government and of the individual are correlative. The individual can do nothing which will interfere with the public right of navigation, or with the right to improve it. But, on the other hand, the public cannot, either by the exercise of the right of navigation, or by its attempted improvement thereof, destroy the private property right of the individual so long as the Constitution says that private property shall not be taken for public use without compensation. When it can no longer improve navigation without destroying the property right of access, then the constitu-

tional provision becomes operative, and requires compensation before the improvement can be made; and any attempt to justify such taking on the ground that it is consequential injury to the land merely loses sight of the chief point of the controversy, and denies the property owner the protection which the Constitution gives him.

Even in *Seranton v. Wheeler*, 179 U. S. 164, 45 L. ed. 137, 21 Sup. Ct. Rep. 48, where the contention was directly made that the right of access was a property right, the court does not seem to be able to treat it as an incorporeal right incident to the land, but beyond and superior to the soil itself, and which is in and of itself a property right within the protection of the Constitution, regardless of physical interference with the land. But it states that, if the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction of public works, away from the shore line, there is not, within the meaning of the Constitution, a taking of private property for public use, but only a "consequential injury to a right which must be enjoyed in due subjection to the rights of the public." There certainly is not a consequential injury to the right of access, because it is destroyed, so the court must have had in mind the effect on the land itself; and this supposition is strengthened by the conclusion that "plaintiff had no such right of property in the submerged lands" as entitled him "to be compensated for any loss of access between upland and navigability." But the question then arises: Is there no right to compensation for the property which the riparian owner had in the right of access itself? When such right is perceived to be a property right its destruction is just as much a taking as was the flooding of the land in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, or as would be the destruction of any other right which forms a material part of the value of the land.

In its simplest form, the riparian right of access is merely an easement or right of way from the upland over the public property to the point of navigability. This is an easement appurtenant, and not in gross; but it is just as surely a property right as is the easement in a right of way from a parcel of land across neighboring land of a private individual to a highway. The public can no

more destroy this property right in the easement than could the private individual place a wall, or dig a moat, across the private right of way so as to destroy the use of it; and, when it does so, it destroys a property right, which, if done by an individual, entitles the injured person to redress, and, when done by the public, brings the injured person within the protection of the constitutional provision requiring compensation for property taken.

If this conclusion can be avoided in the Gibson and Scranton Cases by holding that the riparian right of access is not property in the true sense of the term, but is merely a privilege which is always subject to the public right in the stream, and can be exercised only so far as the interests of the public will permit, so that it cannot be held to exist if necessary improvement of navigation will prevent its exercise,—a position which is not only contrary to the common-law conception of the right, and to the analogous right of access to highways on land, but which should be beneath the dignity of a great nation to urge for the sake of escaping a burden which would rest lightly on the public, while it might fall with crushing weight if thrown on the individual,—such view of the right of access will certainly not avoid the conclusion that the property has been taken where the injury is not to the right of access, but, as in the Salliotte Case, consists in turning the water directly against the bank, so that, if the riparian owner does not take active measures to avoid the injury, his land will be washed away and destroyed.

---

◆◆◆

Index to New Notes  
IN  
LAWYERS' REPORTS, ANNOTATED.

---

Book 65, Parts 3 and 4.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

**Advancements.**

Right of one receiving advancement and executing release of interest in estate to share in after-acquired property:—

- (I.) Scope of note; (II.) in general;
- (III.) effect of release on descendants of deceased releasor; (IV.) release of interest of married woman or infant;
- (V.) conclusion

**Assignment for Creditors.**

Transfer of property out of the state by ;  
conflict of laws as to 353

**Bankruptcy.**

Transfer of property out of the state by  
bankruptcy proceedings; conflict of  
laws as to 353

**Conflict of Laws.**

As to transfer of property out of the  
state by bankruptcy or insolvency pro-  
ceedings or assignment for creditors:—  
(I.) Voluntary assignments: (a) when  
assignment regarded as voluntary;  
(b) discrimination between residents  
and nonresidents, generally; (c) when  
foreign assignment not opposed to *lex  
rei sita et fori*; (d) law determining  
validity of assignments: (1) personal  
property: (a) general rule; (b) formal  
validity; (c) notice; record; taking  
possession; (d) preferences; (e) ex-  
emptions; (f) assignment by corpora-  
tion; (2) real property; (e) law deter-  
mining assignee's right to avoid fraud-  
ulent transfers and conveyances; (f)  
as to effect of assignment to avoid pre-  
vious attachment or transfer; (g) as  
between law of assignor's domicil and  
that of place where assignment made;  
(II.) assignments under insolvency or  
bankruptcy statutes: (a) general rule;  
(b) choses in action; (c) discrimina-  
tion between residents and nonres-  
idents; (d) right of assignee to sue in  
other state 353

**Husband and Wife.**

Liability of husband for necessaries fur-  
nished wife while living with him:—  
(I.) Scope; (II.) introductory; (III.)  
personal necessities: (a) implied  
agency in law; (b) effect of notice to  
tradesmen; (IV.) family necessities;  
(V.) husband's liability affected by  
style of life he adopts: (a) in general;  
(b) effect of notice to tradesmen; (c)  
burden of proof; (VI.) presumptive  
agency arising from cohabitation: (a)  
in general; (b) may be rebutted: (1)  
in general; (2) by proof of ample pro-  
vision otherwise made by husband;  
(a) in general; (b) allowance; (3) by  
proof of notice to tradesmen; (4) by  
proof of authority in wife privately  
withdrawn; (5) by proof of extrava-  
gance of the purchases; (6) burden of  
proof; (VII.) authority implied from  
husband's assent to previous transac-  
tions; (VIII.) liability of husband, by  
reason of estoppel or ratification, for  
wife's purchases upon his credit of  
articles for personal use; (IX.) when  
husband is an infant; (X.) money  
loaned wife to purchase necessities;  
(XI.) in absence of certainty as to  
whom credit was given; (XII.) stat-  
utes 529

**Independent Contractors.**

See MASTER AND SERVANT.

**Insolvency.**

Transfer of property out of the state by  
insolvency proceedings; conflict of  
laws as to 353

**Irrigation.**

See WATERS.

**Master and Servant.**

Persons deemed to be independent con-  
tractors within meaning of rule re-  
lieving employer from liability:—(I.)  
Independent contractors distinguished  
from servants and agents; (II.) per-  
sons acting in the dual capacity of con-  
tractor and servant or agent; (III.)  
contractors not within purview of stat-  
utes relating to servants or agents;  
(IV.) character of contract is tested  
by the existence or absence of a right  
of control on the employer's part; (V.)  
presumptions entertained as to char-  
acter of contract; (VI.) independence  
of contract usually inferable where it  
is for the performance of an entire  
piece of work at a specified price: (a)  
in general; (b) persons engaged in con-  
struction or other work on railways;  
(c) persons who undertake the con-  
struction of entire buildings or spe-  
cific portions thereof; (d) persons en-  
gaged to execute repairs or improve-  
ments on a building; (e) architects;  
(f) persons doing work on bridges;  
(g) persons engaged in other kinds of  
construction work; (h) persons under-  
taking various kinds of work on high-  
ways; (i) persons operating mines;  
(j) persons operating quarries; (k)  
persons operating mills; (l) master  
tradesmen and craftsmen; (m) per-  
sons who furnish teams and men to do  
various kinds of work; (n) draymen,  
truckmen, carters, etc.; (o) keepers of  
livestock stables; (p) drovers; (q) per-  
sons who undertake various operations  
connected with the handling of timber;  
(r) persons employed to clear land;  
(s) persons cultivating land on shares;  
(t) persons engaged in scavenging  
work; (u) railway companies operat-  
ing cars on private lines; (v) persons  
assisting in public entertainments;  
(w) persons conducting departments in  
stores; (x) stevedores; (y) construc-  
tion and repair of ships; (z) transfer  
agents doing business on railway  
trains; (zz) contractors not within  
purview of statutes relating to ser-  
vants only; (VII.) liability arising from  
employment of tug: (a) English doc-  
trine as to relation between owner of  
tug and its tow; (b) American doc-  
trine; (c) liability of harbor commis-  
sioners; (VIII.) liability arising out of  
certain other contracts of an inde-  
pendent nature; (IX.) effect of res-  
ervation of a limited power of con-  
trol: (a) in general; (b) clauses re-  
lating to supervision of work; (c)  
clauses providing that the work shall  
be done under the direction of the em-  
ployer; (d) effect of other clauses;

(X.) effect in general of reservation of full power of control; (XI.) matters negativing independence of contractor: (a) effect of specific terms of contract: (1) work on railroads; (2) construction of buildings; (3) demolition of buildings; (4) street improvements; (5) construction of canals; (6) laying of pipe lines; (7) work in mines; (8) scavenging work; (9) work in manufacturing establishments; (10) sale of commodities; (b) effect of provisions of statute applicable to the circumstances; (c) effect of direct evidence that employer exercised control over the work: (1) work on railways; (2) construction of buildings; (3) work in streets; (4) clearing of land; (5) work in manufacturing establishments; (6) work done with teams; (7) unloading of ships; (8) sale of commodities; (d) effect of character of stipulated work; (e) effect of employment being general; (f) effect of partition of work among several contractors: (XII.) nature of contract determined with reference to various factors: (a) degree of skill or care required; (b) existence or absence of obligation to perform work in person; (c) reservation of right to terminate contract of employment; (d) surrender or retention of control of premises on which stipulated work is done: (1) surrender of control; (2) retention of control; (e) the basis on which the compensation of the employee is calculated; (f) pecuniary circumstances of person employed; (g) provision in contract that employer shall be indemnified for all losses caused by the negligence of the person employed; (h) use of contractor's appliances by employer; (i) the furnishing by the employer of the appliances or materials for the work; (j) the fact that the stipulated work constituted a part of the employer's regular operations; (k) provision in contract prohibiting use of employer's name; (l) the fact that the contractor was a director of the employing company; (m) virtual identity of an employing and contracting company; (XIII.) province of court and jury

445

General rule as to absence of liability of employer for torts of independent contractor:—(I.) Scope of note; (II.) general doctrine stated; (III.) history of the doctrine: (a) *Bush v. Steinman* considered; (b) doctrine that different rules apply to real and to personal property; (c) final rejection of doctrine making distinction between real and personal property; (d) effect of decision in *Randleson v. Murray*; (e) subsequent development of the law; (IV.) rationale of the doctrine; (V.) extent of employer's duty with respect to the supervision and direction of the work; (VI.) extent of duty of employ-

er to guard against possible accidents; (VII.) for what torts of contractor the employer is not bound to answer: (a) in general; (b) negligence not productive of permanently dangerous conditions: (1) work on railways; (2) work on buildings; (3) work on highways; (4) work involving the handling of heavy articles; (5) management of teams; (6) management of vessels; (7) entertainment at public resorts; (8) loading or unloading of ships; (9) blasting operations; (c) negligence productive of dangerous conditions of a more or less permanent character: (1) in general; (2) work on railways; (3) construction of bridges, embankments, and dams; (4) construction of telegraph and telephone lines; (5) laying of pipe lines; (6) construction of buildings; (7) repairing or reconstruction of buildings; (8) demolition of buildings; (9) work performed on streets and highways; (10) work done on premises adjacent to streets and highways, and affecting the safety thereof; (11) scavenging work; (12) work in harbors; (13) excavation work; (14) work involving the use of fire for the destruction of timber; (15) work in mines; (16) hauling of timber; (17) operation of ferries; (18) loading or unloading of ships; (d) acts constituting a trespass

620

**Release.**

Of interest in estate by one receiving advancement; effect on right to share in after-acquired property

578

**Waters.**

Transfer of right to use water for irrigation:—(I.) Of right acquired by appropriation; (II.) of right in ditch; (III.) may pass by conveyance of land; (IV.) method of transfer

407

The part containing any note indexed will be sent with CASE AND COMMENT for one year for \$1.

**Among the New Decisions.****Advancements.**

The execution of releases from part only of the children to whom advancements are made, of all further interest in the estate, is held, in *Headrick v. McDowell* (Va.) 65 L. R. A. 578, not to destroy their right to share in intestate property thereafter accumulated by the ancestor, where all his children had shared equally in the advancements.

**Animals.**

See CONSTITUTIONAL LAW.

**Assignment of Wages.**

See also CONSTITUTIONAL LAW.

An assignment of wages to be earned in the future under an existing contract is held, in *Mallin v. Wenham* (Ill.) 65 L. R. A. 602, to be valid; and the fact that the term of employment is not of definite duration is held to be immaterial.

**Bankruptcy.**

A judgment obtained by a wife for damages by reason of the alienation of the affections of her husband is held, in *Leicester v. Headley* (Kan.) 65 L. R. A. 523, not to be released by the discharge of the judgment debtor in bankruptcy, where such alienation was accomplished by schemes and devices of the judgment debtor, and resulted in the loss of support and impairment of health to the wife.

**Benevolent Societies.**

The members of an unincorporated mutual benefit association are held, in *Cochran v. Boleman* (Ind.) 65 L. R. A. 516, not to be subject to suit by the beneficiary of a deceased member for their respective shares of such benefit, where the by-laws of the association contemplate the collection and disbursement of benefits by officers, and forfeiture of membership is the only penalty provided for failure to pay an assessment.

**Bills of Lading.**

A merchant who ships goods to his broker without conveying title to him, but purely for the purpose of distribution to others, and sends to him a bill of lading indorsed in blank for the goods, the possession of which, by the general custom of trade, is regarded as evidence of the right to dispose of the property, is held, in *Commercial Bank v. J. K. Armsby Co.* (Ga.) 65 L. R. A. 443, not to be able, in an action of trover, to recover

the goods from a bank which has, in good faith, and without notice of the owner's title, taken the bill of lading as security for a loan of money to the broker on his individual account, and converted the property upon default in the payment of its debt.

**Blasting.**

The operation of a stone quarry on city lots for a long period of time by means of blasting, which causes vibrations of the earth and air in such a manner as to render an adjoining dwelling unsafe for occupation, and causes rents in its walls, is held, in *Longtin v. Persell* (Mont.) 65 L. R. A. 655, to render the one responsible therefor liable for the injury, although he uses due care in the prosecution of the work.

Blasting by the use of gunpowder or dynamite is held, in *Cary v. Morrison* (C. C. A. 8th C.) 65 L. R. A. 659, to be an appropriate and justifiable mode of removing rock from the right of way of a railroad in order to bring it to grade, where the blasting is done with reasonable care.

**Bloodhounds.**

See EVIDENCE.

**Carriers.**

A railroad company transporting mail, either under contract with the government or by reason of the general laws and the regulations of the Postoffice Department, is held, in *Bankers' Mutual Casualty Co. v. Minneapolis, St. P. & S. S. M. R. Co.* (C. C. A. 8th C.) 65 L. R. A. 397, to be an agent of the government, and not liable to individuals for loss of mail through negligence of its subordinate employees.

A railroad ticket, although torn in two pieces, is held, in *Young v. Central of Georgia R. Co.* (Ga.) 65 L. R. A. 436, not to be "mutilated" within the meaning of a stipulation on its face that it shall not be good for passage if mutilated, and the ticket is held to be valid when both pieces are pre-

sented to the conductor at the same time, and it is apparent that they are parts of the same ticket, and that no fraud has been perpetrated upon the railroad company.

### Charities.

A hospital organized exclusively for charity is held, in *Powers v. Massachusetts Homeopathic Hospital* (C. C. A. 1st C.) 65 L. R. A. 372, not to be liable for injury to a patient caused by the negligence of its carefully selected nurse, even though a charge is made and paid for the services rendered,—at least if the amount paid does not make full pecuniary compensation for such services.

### Conflict of Laws.

A deed of trust to secure debts executed by a corporation at its domicil in one state is held, in *Smead v. D. W. Chandler & Co. (Ark.)* 65 L. R. A. 353, to be governed, as to its nature, character, and interpretation, by the laws of that state, although it involves choses in action in another state, where the corporation is doing business, and in whose courts the interpretation of the instrument is called in question.

### Constitutional Law.

A statute forbidding the use of horses whose tails are docked after its passage is held, in *Bland v. People (Colo.)* 65 L. R. A. 424, not to be void as an unconstitutional deprivation of property.

A statute forbidding, under penalty, persons or corporations engaged in private enterprises from paying employees in store orders not redeemable in cash is held, in *State v. Missouri Tie & T. Co. (Mo.)* 65 L. R. A. 588, to be unconstitutional as interfering with the right to contract.

A statute prohibiting the assignment of future wages by employees is held, in *International Text-Book Co. v. Weissinger (Ind.)* 65 L. R. A. 599, not to be void as an unreasonable restraint upon the liberty of the

citizen, or as depriving him of his property without due process of law.

The legislature is held, in *Marsh v. Stonebraker (Neb.)* 65 L. R. A. 607, not to be prohibited by any provision of the Constitution from granting to a person the right to publish the statutes of the state, and making such statute *prima facie* evidence of the law, nor from purchasing such number of copies thereof as the legislature may deem necessary for the use of its officers.

A statute authorizing game wardens to seize and forfeit to the state summarily, without affording the owner thereof opportunity for a hearing, all guns, ammunition, decoys, fishing tackle, etc., in actual use by persons hunting in violation of the game law, is held, in *McConnell v. McKillip (Neb.)* 65 L. R. A. 610, to be void as depriving the owner of his property without due process of law.

A statute authorizing the seizure and withholding of gaming tables or other instruments of gaming until after the trial of the owner on a charge of using them for gambling purposes is held, in *Woods v. Cotrell (W. Va.)* 65 L. R. A. 616, not to be unconstitutional as depriving a person of his property without due process of law.

### Damages.

The right to recover damages for mental suffering for failure to deliver a telegram, although not accompanied by physical suffering or injury, is sustained in *Barnes v. Western U. Teleg. Co. (Nev.)* 65 L. R. A. 606.

### Deeds.

A condition in a deed of a small parcel of land that no grain shall ever be handled on the land granted, which contains no facilities for handling grain at the time of the grant, is held, in *Wakefield v. Van Tassell (Ill.)* 65 L. R. A. 511, not to be unreasonable or contrary to public policy.

**Evidence.**

Persons sued for the search of a citizen's house without a warrant are held, in *McClurg v. Brenton* (Iowa) 65 L. R. A. 519, to be entitled to prove the presence of bloodhounds in the searching party, and the use made of them, as bearing upon the question of malice; but the right to introduce evidence as to the breeding and training of the hounds is held to be inadmissible.

**Executors and Administrators.**

A contract by one named as executrix in a will, that, in consideration of the withdrawal of opposition to its probate, she will distribute money which comes into her hands as executrix as fast as a certain sum shall accumulate, is held, in *Painter v. Kaiser* (Nev.) 65 L. R. A. 672, to be enforceable against the promisor in her individual capacity.

**Finder.**

The right of one who, while in the employ of another, finds upon the latter's premises money evidently hidden and forgotten by an unknown owner, to maintain an action of trover against his employer, where the latter takes the money out of his possession and refuses to restore it, is sustained in *Daniels v. Roberts* (Or.) 65 L. R. A. 526.

**Game Laws.**

See CONSTITUTIONAL LAW.

**Gaming.**

See CONSTITUTIONAL LAW.

**Highways.**

To uphold the statute imposing the duty upon the owners or occupants of abutting

land to keep the sidewalks free from snow and ice, it is held, in *McGuire v. District of Columbia* (D. C. App.) 65 L. R. A. 430, that there must be no inequality in the burden imposed on the respective classes of persons upon whom the duty is imposed, nor unjust discrimination in favor of some and against others.

The public, by laying out a highway, is held, in *Bigelow v. Whitecomb* (N. H.) 65 L. R. A. 676, not to acquire a right to prevent the owner of the fee from removing and applying to his own use timber standing therein, in which the public may desire to preserve for shade or ornamentation.

**Hospitals.**

See CHARITIES.

**Husband and Wife.**

The obligation of a man to pay for necessities furnished to his wife, with whom he is living, upon the theory of implied agency on her part, is denied in *Wanamaker v. Weaver* (N. Y.) 65 L. R. A. 529, where she was amply supplied with articles of the same character as those purchased, or was furnished with ready money with which to pay cash for them.

**Insurance.**

See also BENEVOLENT SOCIETIES.

The indorsement by the clerk of an insurance company of a slip of paper notifying the company of a shipment to be covered by an open marine policy in the usual way, with the amount of the premium and the check mark indicating its readiness for entry in the books, is held, in *Delaware Ins. Co. v. S. S. White Dental Mfg. Co.* (C. C. A. 3d C.) 65 L. R. A. 387, not to show an acceptance of the risk in the face of its positive rejection by the officers of the company as soon as they learned that it was on property already lost, of which the assured is notified without delay.

The recovery by the next of kin on a policy

upon the life of one murdered by the beneficiary named in the policy is held, in Supreme Lodge K. & L. of H. v. Menkhausen (Ill.) 65 L. R. A. 508, not to be forbidden by public policy.

---

### Libel.

---

The business of pretending to heal absent patients by supernatural powers without medicine or surgery is held, in Weltmer v. Bishop (Mo.) 65 L. R. A. 584, to be fraudulent, and not protected by the law against libel, although many persons claim to have been benefited by the treatment.

---

### Lis Pendens.

---

The title secured by a purchase, by a stranger after an appeal has been taken from the judgment, from one who has purchased mortgaged real estate at his own foreclosure sale, is held, in Nola v. Allison (Cal.) 65 L. R. A. 419, to be subject to be defeated by a reversal of the judgment, notwithstanding the execution of the judgment was not superseded pending the appeal.

---

### Mails.

See CARRIERS.

---

### Master and Servant.

See also CONSTITUTIONAL LAW.

A competent person who undertakes to construct the brick work on a building with his own employees and according to his own discretion is held, in Richmond v. Sitterding (Va.) 65 L. R. A. 445, to be, as to such work, an independent contractor, for whose negligence the owner of the building is not responsible.

One who contracts for the sinking of a shaft on his property, agreeing to furnish the necessary tools, including a "hoist," while the other party is to furnish the labor, is held, in Central Coal & I. Co. v. Grider

(Ky.) 65 L. R. A. 455, not to be liable for an injury to an employee through the breaking of a rope used on the hoist, which is sufficient when furnished, but is allowed by the contractor to become defective.

One who contracts to construct bridge abutments according to plans and specifications already prepared for one who has taken the contract for the construction of the bridge is held, in Salliotte v. King Bridge Co. (C. C. A. 6th C.) 65 L. R. A. 620, to be an independent contractor, for whose acts the employer is not responsible, although his agent exercises some kind of general supervision for the purpose of seeing that the work is done according to the contract.

---

### Municipal Corporations.

---

A municipal corporation is held, in Canton v. Canton Cotton Warehouse Co. (Miss.) 65 L. R. A. 561, to have no such title to the fee of its streets as entitles it to claim compensation from a railroad company which, by virtue of a legislative franchise, occupies a portion of a street for a crossing.

---

### Obstructing Justice.

---

A small boat used for the common carriage of passengers for hire, and having neither sleeping apartments nor places for meals, is held, in People v. Bernard (Mich.) 65 L. R. A. 559, not to be a dwelling house, so as to justify the forcible resistance of an officer who attempts to enter it to serve process, although a seat in the boat is used for a sleeping place by the person in possession of the boat.

---

### Patents.

---

A patent on a bogus-coin detector for use on self-operating vending machines is held, in Fuller v. Berger (C. C. A. 7th C.) 65 L. R. A. 381, not to be void for want of utility in the device because it has been used only in connection with gambling appliances,

where it is equally capable of use on machines used for legitimate purposes.

#### Postoffice.

See **MAILS**.

#### Proximate Cause.

That injury to one attempting to drive a horse across a railroad track would not have happened but for the unsnapping of a line is held, in *Hinchman v. Pere Marquette R. Co.* (Mich.) 65 L. R. A. 553, not to relieve the railroad company from liability for the injury, if the horse was frightened by defendant's negligence, and the unsnapping of the line was caused by its rearing because of the fright.

#### Railroads.

See **MUNICIPAL CORPORATIONS; PROXIMATE CAUSE**.

#### Sunday.

The right to declare a contract made on Sunday void because opposed to public policy is denied, in *Rodman v. Robinson* (N. C.) 65 L. R. A. 682.

#### Telegrams.

See **DAMAGES**.

#### Trees.

See **HIGHWAYS**.

#### Trover.

See **BILLS OF LADING; FINDER**.

#### Waters.

Users of water from a ditch or canal are held, in *Hard v. Boisé City I. & L. Co.* (Idaho) 65 L. R. A. 407, to be entitled to sell and transfer the right to use such waters; and the purchaser is held to have a right to transfer it to other lands under the ditch or canal, so long as the change of place does not interfere with the rights of others.

#### New Books.

**"Handbook of the Law of Public Corporations."** By Henry H. Ingersoll, LL.D. St. Paul, Minn. West Publishing Company. 1904. 1 Vol. \$3.75.

This new handbook is made by the Dean of the University of the Tennessee School of Law. His fitness for the work is undoubtedly. The subject includes such quasi corporations as counties, as well as municipal corporations, more strictly so called. It is a very valuable addition to the popular Hornbook Series.

**"Some After-Dinner Speeches, Anecdotes, and Toasts."** Detroit, Mich. The Bookkeeper Publishing Company, Limited. 1904. \$1.

This is a very neat and attractive little book, containing after dinner speeches by Depew, Cleveland, John M. Allen, Bourke Cochran, J. Adam Bede, Col. McClure, Senator Hanna, William Bunn, Tom L. Johnson, President Roosevelt, Gen. John C. Black, J. H. Choate, Senator Beveridge, and James H. Eckels. In addition to this there is quite an extensive collection of anecdotes and toasts. The average quality of the contents is exceptionally good. In short, it is the best collection of after-dinner speeches for the size and price that has yet come to hand.

**"The United States and the States under the Constitution."** By C. Stuart Patterson. 2d ed. Revised and enlarged. \$4 net.

**"An Outline of Municipal Government in the City of New York."** By George Arthur Ingalls. 75 cts.

**"Constables' Guide."** (New York.) By Bender & Hinman. \$1.50.

**"Charter of Cities of the Second Class."** By Charles F. Bridge. \$2.50.

**"The Law of Liens."** With especial reference to Massachusetts and Maine. By Henry T. Lummus. \$3.

**"Benefit Societies and Life Insurance."** 3d ed. By Frederick H. Bacon. 2 Vols. \$12.

**"Contracts."** By William Herbert Page. 3 Vols. \$18.

**"Supplement to Shannon's Code."** (Tennessee.) 1 Vol. \$6 net.

**"Smithson's Civil Procedure."** A compilation of the civil practice in Tennessee. \$10.

"The Law of Crimes and Criminal Procedure." By Lewis Hochheimer. 2d ed. \$5.

"The Real Property Law of the State of New York." 2d ed. Revised and much enlarged. By Robert L. Fowler. 1 Vol. \$6.50 net.

"The Law of Torts." By Sir Frederick Pollock. 7th Eng. ed. \$6.

"Babylonian and Assyrian Laws, Contracts and Letters." By Prof. C. H. W. Johns. First volume in the Library of Ancient Inscriptions. \$3.50 net.

"American Electrical Cases." Vol. 8. By Frank B. Gilbert. Sheep, \$6.

"New York and New Jersey Corporations." 2d ed. By William H. Black. \$3 net.

### Recent Articles in Law Journals and Reviews.

"The Divorce Agitation."—20 Law Quarterly Review, 363.

"Loans for the Making or Payment of Wagers."—20 Law Quarterly Review, 436.

"The Federal Power over Trusts (Continued)."—29 National Corporation Reporter, 275, 276.

"The Enforcement Abroad of Stockholders' or Directors' Liability (Continued)."—29 National Corporation Reporter, 277, 283.

"Genesis of the Federal Judiciary System."—19 Chicago Law Journal, 1319.

"The Federal Power over Trusts (Conclusion)."—29 National Corporation Reporter, 311, 312.

"A Practical Question of the Law of Fraudulent Conveyances."—59 Central Law Journal, 344.

"Federal Common Law."—10 Virginia Law Register, 475.

"Sales Under Deeds of Trust—Unauthorized Sales—Defective Execution of Power."—10 Virginia Law Register, 491.

"Liability of Telegraph Companies for Negligence in the Transmission and Delivery of Messages."—10 Virginia Law Register, 507.

"Has a State Court Jurisdiction to Issue an Injunction against a Receiver Appointed by a Federal Court?"—59 Central Law Journal, 382.

"Early American Marriage Laws."—24 Law Register, 804.

"The Doctrine of Waiver."—3 Michigan Law Review, 9.

"Surrender."—3 Michigan Law Review, 18. "Equitable Conversion."—18 Harvard Law Review, 1.

"Assignability of Contract."—18 Harvard Law Review, 23.

"Notice, Condition and Declaration—The Dominion Railway Act, Sec. 246."—3 Canadian Law Review, 495.

"Sunday Laws."—3 Canadian Law Review, 509.

"A Study of Capital Punishment."—3 Canadian Law Review, 515.

"Rescission by Parol Agreement."—4 Columbia Law Review, 455.

"The History of the Adoption of Section I. of Article IV. of the United States Constitution and a Consideration of the Effect on Judgments of that Section, and of Federal Legislation."—4 Columbia Law Review, 470.

"The Exclusive Power of Congress to Regulate Interstate and Foreign Commerce."—4 Columbia Law Review, 490.

"Fire Insurance as an Indemnity Contract."—59 Central Law Journal, 364.

"Gambling and Cognate Vices."—14 Yale Law Journal, 9.

"The Massachusetts Proposition for an Employers' Compensation Act."—14 Yale Law Journal, 18.

### The Humorous Side.

A **LEGAL NAPOLEON OF THE SLOPE.**—The following letterhead, minus the name of the lawyer and of his town, is sent us from Iowa:

"Love not sleep, lest thou come to poverty." Judge Solomon.

— — — — —, Lawyer.

Office Over First National Bank.

Am the red-headed, smooth-faced, freckle-wounded Legal Napoleon of the Slope, and always in the stirrups. Practice in every court on earth except that of Judge Lynch. Quick as a hippopotamus and gentle as a sunstroke. Refer to my friends and likewise to my enemies.

"Fees are the Sinevws of War."

— — — — —, Iowa.

